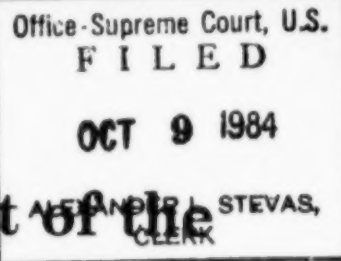


84-589 (1)

No. _____



**In the Supreme Court of the
United States
OCTOBER TERM, 1984**

PAUL EDMOND DOWLING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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QUESTIONS PRESENTED

- I. WHETHER THE DISTRICT COURT AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN CONCLUDING THAT THE INTERSTATE TRANSPORTATION OF RECORD ALBUMS CONTAINING COMPOSITIONS RECORDED WITHOUT THE CONSENT OF THE COPYRIGHT OWNER CONSTITUTES THE TRANSPORTATION OF "STOLEN GOODS" WITHIN THE MEANING OF 18 U.S.C. §2314?
- II. WHETHER THE DISTRICT COURT AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN CONCLUDING THAT THE MANUFACTURE AND DISTRIBUTION OF RECORD ALBUMS CONTAINING COMPOSITIONS RECORDED WITHOUT THE CONSENT OF THE COPYRIGHT PROPRIETOR CONSTITUTE "MAIL FRAUD" WITHIN THE MEANING OF 18 U.S.C. §1341?

TOPICAL INDEX

	Page
Questions Presented	i
Opinion Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement Of The Case	4
A. Preliminary Statement	4
B. Course Of Proceedings	4
C. Summary Of The Stipulated Facts	5

Reason For Granting The Writ

I

The District Court And The Court Of Appeals For The Ninth Circuit Erred In Concluding That Petitioner Dowling's Acts Of Copyright Infringe- ment Could Also Support Felony Convictions For Mail Fraud And Interstate Transportation Of Stolen Property	6
A. The District and Appellate Courts' Conclusion that Acts Constituting Copyright Infringement May Also Support a Felony Conviction for Mail Fraud and Interstate Transportation of Stolen Property Violates Traditional Notions of Separa- tion of Powers and is Tantamount to Judicial Legislating	6
A(1) There is No Clear Indication From Either the Statutory Language or the Legislative History of the National Stolen Property Act (NSPA) and the Mail Fraud Statute That Congress Intended Application of These Statutes to Conduct Constituting Copyright Infringement	11
A(2) The District Court's Ruling and the Ninth Circuit Decision That Acts of Copyright	

Infringement May Also Come Within The Purview of Mail Fraud and NSPA Statutes Impermissibly Increased Criminal Penalties for Copyright Infringement Beyond That Prescribed by Congress in the Copyright Act.....	12
B. Basic Principles of Statutory Construction Compel the Conclusion That Copyright Infringement is Not Encompassed by 18 U.S.C. § § 2314 and 1341	16
II	
The Ninth Circuit's Decision That Copyright Infringement Activities Are Prohibited By 18 U.S.C. § 2314 Is Inconsistent With Existing Ninth Circuit Precedent And The United States Supreme Court's Decision In <i>Sony Corporation V. Universal Studios</i> , ____ U.S. ____, 104 S.Ct. 774 (1984).....	17
III	
Petitioner's Conduct Constituting Copyright Infringement Is Not, As A Matter Of Law, Sufficient To Sustain A Conviction For Mail Fraud Pursuant To 18 U.S.C. § 1341	20
Conclusion.....	25
Appendix	A1

TABLE OF AUTHORITIES CITED

Cases	Page
Deepsough Packing Co. v. Laitram Corp., 406 U.S. 518 (1972).....	7
Kneiss v. United States, 413 F.2d 752 (9th Cir. 1969).....	16
Pereiar v. United States, 347 U.S. 1(1954).....	20
Piracy & Counterfeiting Amendment Acts of 1982, PUB.L. No. 97-180, 96 Stat. 91 (1982)....	14, 15
Preiser v. Rodriquez, 411 U.S. 475, 489 (1973).....	16
Simpson v. United States, 435 U.S. 6 (1978).....	16
Sony Corporation v. Universal City Studios, ____ U.S. ____, 104 S.Ct. 774 (1984)....	6, 7, 9, 17, 18, 19
Thompson v. Hubbard, 131 U.S. 123 (1889).....	6
United States v. Bass, 404 U.S. 336 (1971).....	6
United States v. Belmont, 715 F.2d 459 (9th Cir. 1983), <i>cert. denied</i> , ____ U.S. ____, 104 S.Ct. 1275 (1984).....	8, 9, 10, 12, 18
United States v. Brewer, 528 F.2d 492 (4th Cir. 1975).....	22, 23
United States v. Carman, 577 F.2d 556 (9th Cir. 1978).....	17, 18
United States v. Gallant, 570 F.Supp. 303 (S.D.N.Y. 1983).....	24
United States v. Kelem, 416 F.2d 346 (9th Cir. 1969) <i>cert. denied</i> , 397 U.S. 952.....	21
United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979) <i>cert. denied</i> , 445 U.S. 961.....	21
United States v. Smith, 686 F.2d 234 (5th Cir. 1982).....	8, 9, 10, 11, 12, 13, 15
United States v. Turley, 352 U.S. 407 (1957).....	20
Williams v. United States, ____ U.S. ____, 102 S.Ct. 3088 (1982).....	16, 17

Statutes

Cal. Comm. Code §2105 (West 1964).....	18
Cal. Comm. Code §9106 (West Sup. 1983).....	18
United States Code:	
15 U.S.C. §376.....	22
17 U.S.C.	
§115.....	21, 24
§506.....	13, 14, 16
§506(a).....	4, 8, 12, 18
§506(b).....	8, 12
18 U.S.C.	
§371.....	4
§1341.....	Passim
§1342.....	17
§2134.....	20
§2313.....	20
§2314.....	Passim
§2318.....	13, 14, 16, 18
§2318(c)(2).....	23
§2319.....	3, 14, 16, 18
§2319(a).....	8, 9, 12
§2319(b)(3).....	14, 15
28 U.S.C., §1254(1).....	2

Constitutions

U.S. Constitution, Article 1 §8.....	7
--------------------------------------	---

Other Authorities

S.Rep. No. 97-274, 4 U.S. Code Cong. & Ad. News 1982).....	14
62 Stat 928.....	2

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Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Petitioner, Paul Dowling, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cause on August 10, 1984.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit appears as Appendix "A" attached hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 10, 1984. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2314 provides, in pertinent part, as follows:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud;

* * *

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

* * *

The mail fraud statute, 18 U.S.C. § 1341, provides as follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other articles, or anything represented to be or intonated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

The criminal infringement of a copyright statute, 18 U.S.C. § 2319, provides, in part, as follows:

(a) Whoever violates Section 506(a) (relating to criminal offenses) of Title 17 shall be punished as provided in Section (b) of this Section and such penalty shall be in addition to any other provisions of Title 17 or any other law.

(b) Any person who commits an offense under subsection (a) of this Section —

(1) Shall be fined not more than \$250,000 or imprisoned for not more than five years, or both, if the offense —

(A) Involves the reproduction or distribution, during any one-hundred-and-eighty day period, of at least 1,000 phonorecords or copies infringing the copyright in one or more sound recordings;

* * *

(C) A second or subsequent offense under either subsection (b)(1) or (b)(2) of this Section, where a prior offense involved sound recording, or a motion picture or other audio visual work;

(2) Shall be fined not more than \$250,000 or imprisoned for not more than two years, or both, if the offense —

(A) Involves the reproduction or distribution, during any one-hundred-and-eighty day period of more than 100 by less than 1,000 phonorecords or copies infringing the copyright in one or more sound recordings; . . .

(3) Shall be fined not more than \$25,000 or imprisoned for not more than one year, or both, in any other case.

(c) As used in this Section —

(1) The terms 'sound recording', 'motion picture', 'audio visual work', 'phonorecord' and 'copies' have, respectively, the meaning set forth in Section No. 1 (related to definitions) of Title 17; and

(2) The terms 'reproduction' and 'distribution' refer to the exclusive rights of a copyright owner under clauses (1) and (3) respectively of Section 106 (relating to exclusive rights in copyrighted works), as limited by Sections 107 through 118, of Title 17.

STATEMENT OF THE CASE

A. PRELIMINARY STATEMENT

This appeal is from the criminal conviction of Petitioner Paul Edmond Dowling, on charges of conspiracy to transport stolen property in interstate commerce, 18 U.S.C. §371, interstate transportation of stolen property, 18 U.S.C. §2314, copyright infringement, 17 U.S.C. §506(a), and mail fraud, 18 U.S.C. §1341. Petitioner was convicted after a court trial on stipulated facts in the United States District Court for the Central District of California, before the Honorable Lawrence T. Lydick.

B. COURSE OF PROCEEDINGS

On March 22, 1983, Petitioner Paul Edmond Dowling and two co-defendants were charged in a twenty-seven count superseding indictment. Mr. Dowling was charged in Counts One, Two through Nine, Ten through Nineteen, and Twenty-Five through Twenty-Seven, which allege, respectively, violations of 18 U.S.C. §371 (conspiracy to transport stolen property); 18 U.S.C. §2314 (interstate transportation of stolen property); 17 U.S.C. §506(a) (copyright infringement); and 18 U.S.C. §1341 (mail fraud).

The District Court severed Mr. Dowling's trial from the trial of his co-defendants, and Mr. Dowling waived his right to a jury

trial. The Court found Mr. Dowling guilty of all counts against him and sentenced him to a cumulative prison term of eighteen months: nine concurrent one-year terms on the misdemeanor copyright violations and three concurrent six-month terms on the three felony mail fraud counts. The Court additionally placed Mr. Dowling on probation for five years on the condition that he pay a \$5,000 fine and perform 1,500 hours of community service.

On appeal, Mr. Dowling did not contest his conviction on the misdemeanor copyright infringement counts (12 through 26 of the indictment). However, Mr. Dowling contested his felony convictions and maintained, as he did before the District Court, that the sale of the materials in no way constituted interstate transportation of stolen property or mail fraud within the meaning of 18 U.S.C. §§2314 and 1341.

C. SUMMARY OF THE STIPULATED FACTS

Mr. Dowling has been a collector of Elvis Presley recordings for over ten years, having massed a record collection of over 2,000 titles. (R.T. 87). He has obtained these recordings generally by purchase from or trade with other collectors located around the world. (R.T. 89).

Beginning in 1976, Mr. Dowling became involved in the sale of Elvis Presley sound recordings as a business. (R.T. 90). Mr. Dowling did not sell copies of recordings commercially released by RCA or any other major label. Instead, he sold records only containing "out takes", i.e., material that had not been commercially released by RCA or other companies. (R.T. 90). At the stipulated facts trial, Mr. Dowling directly admitted that he manufactured and distributed albums (on certain label names not connected with any of the major record companies) containing the out takes of Elvis Presley performances and he paid no royalties to the holders of the composition copyrights. (R.T. 90-112). Mr. Dowling made seven unauthorized albums: one from a concert tape, one from the sound tracks of two Presley motion pictures, and the others from studio "out takes" and tapes of Presley television appearances.

Mr. Dowling utilized the services of Sund Service, an addressing and mailing service located in Glendale, California, which mailed over 50,000 catalogues and flyers advertising the phonorecords. Mr. Dowling's co-defendant collected the orders and then sent them to Mr. Dowling who mailed the requested albums from Maryland.

REASON FOR GRANTING THE WRIT

I

THE DISTRICT COURT AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN CONCLUDING THAT PETITIONER DOWLING'S ACTS OF COPYRIGHT INFRINGEMENT COULD ALSO SUPPORT FELONY CONVICTIONS FOR MAIL FRAUD AND INTERSTATE TRANSPORTATION OF STOLEN PROPERTY

A. The District and Appellate Courts' Conclusion that Acts Constituting Copyright Infringement May Also Support a Felony Conviction for Mail Fraud and Interstate Transportation of Stolen Property Violates Traditional Notions of Separation of Powers and is Tantamount to Judicial Legislating.

The law is well settled that the legislature, not the courts, should define criminal activity. *See United States v. Bass*, 404 U.S. 336, 347-48 (1971). The separation of powers concern implicit in this principle was recently addressed in *Sony Corporation v. Universal City Studios*, ___ U.S. ___, 104 S.Ct. 774 (1984). In *Sony*, the United States Supreme Court emphasized that "the protection given to copyright is wholly statutory (citation) [therefore] the remedies for infringement 'are only those prescribed by Congress.'" *Id.* at ___, 104 S.Ct. at 783, quoting *Thompson v. Hubbard*, 131 U.S. 123, 151 (1889) (emphasis added). The constitutional premise

underlying this principle is found in Article 1, Section 8 of the United States Constitution which mandates that Congress shall have the power to promote the arts by securing for authors the exclusive right to their writing. This "limited grant . . . is intended to motivate the creative activity of authors" so that the public will have access to the product of their creative activity. *Sony*, ___ U.S. at ___, 104 S.Ct. at 782.

The Supreme Court further explained that the task of defining the scope of this "limited monopoly" has been assigned to Congress precisely because it involves the balancing of interests — the interest of the authors in control and exploitation of their work, and the competing interest of society in the free flow of information and ideas. *Id.* at ___, 104 S.Ct. at 782. For this reason, "[t]he judiciary's reluctance to expand the protection afforded by the copyright laws without *explicit legislative guidance* is a recurrent theme." *Id.* at ___, 104 S.Ct. 783 (citations omitted). The Supreme Court accordingly rejected the view adopted by the Ninth Circuit in *Sony* that a federal copyright infringement claim could be premised upon the sale of a videotape recorder (VTR) to the general public for private home recording of programs broadcasted without charge to the viewer. The Court reaffirmed the principle that only Congress has the power to remedy copyright infringements and the Supreme Court rejected the Ninth Circuit's suggestion of a judicially created remedy for copyright infringement. This Court stated:

"The direction of Art. 1 is that *Congress* shall have the power to promote the progress of science and the useful arts. When, as here, the constitution is permissive, the sign of how far Congress has chosen to go can only come from Congress."

Id. at ___, 104 S.Ct. at 796, quoting *Deepsough Packing Co. v. Laitram Corp.*, 406 U.S. 518, 530 (1972).

Petitioner respectfully contends that the District Court's decision that 18 U.S.C. §§2314 and 1341 reach acts of copyright and infringement increased the criminal penalties for such conduct beyond that prescribed by Congress in the

Copyright Act, 17 U.S.C. § 506(a) and (b), and the amendments to the National Stolen Property Act (NSPA), 18 U.S.C. § 2319(a). On appeal, the Ninth Circuit rejected petitioner's argument and affirmed the decision of the District Court relying on its decision in *United States v. Belmont*, 715 F.2d 459 (9th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1275 (1984). In *Belmont*, the Ninth Circuit rejected the argument that nothing in the language of the NSPA or its legislative history suggested that copyright infringement is conduct which may be properly prosecuted under Section 2314. The *Belmont* Court also rejected the argument that recent criminal amendments to the copyright laws, *e.g.*, 18 U.S.C. § 2319(a), indicated that Congress did not intend to punish copyright infringement under 18 U.S.C. § 2314. The *Belmont* Court reasoned that because the amendments to the copyright law were adopted "in addition to other law", and Section 2314 was "other law", copyright infringement could be prosecuted under Section 2314. *Belmont*, 715 F.2d at 461. Thus, the Ninth Circuit refused to follow the Fifth Circuit's decision in *United States v. Smith*, 686 F.2d 234 (5th Cir. 1982).

In *Smith*, the defendant recorded broadcast features from regular "off the air" television broadcasts and then distributed copies. He was convicted of misdemeanor copy infringement and interstate transportation of stolen goods. On appeal, the Fifth Circuit concluded that copyright infringement is not the equivalent of having "stolen, converted or [taking] by fraud" as that phrase is used in 18 U.S.C. § 2314. The Fifth Circuit also determined that it was "not at liberty to find that the rights associated with copyright are within the usual or common sense meaning of the phrase 'goods, ware [or] merchandise.'" 686 F.2d at 239.

In so holding, the court noted that a determination of whether Congress intended for Section 2314 to apply to copyright infringement implicates the constitutional concerns of separation of powers, since significant potential exists for a court to encroach on Congress' law making and prerogative. The Fifth Circuit recognized that it is Congress' province to determine

what shall be a crime and how it shall be punished. The court also applied the principle of statutory construction that criminal statutes are to be strictly construed.

Mr. Dowling requested the Ninth Circuit to reconsider its reasoning in *Belmont* in light of the Supreme Court's decision in *Sony* and the Fifth Circuit's decision in *Smith*. Mr. Dowling argued that the mere fact that remedies in Section 2319(a) were added to the copyright laws in addition to those existing in other laws was hardly "explicit legislative guidance" that Section 2314 was intended by Congress to be a remedy for copyright infringement. *See, e.g., Sony*, ____ U.S. ____ at ____, 104 S.Ct. at 782.

The Ninth Circuit nevertheless relied on rationale of *Belmont* in upholding Mr. Dowling's conviction under the mail fraud statute. *See Appendix "A"* at 6-7. The Ninth Circuit also found unpersuasive Mr. Dowling's argument that *Belmont's* expansive interpretation of Section 2314 was a form of judicial legislating that did not comport with the clear admonition from the Supreme Court to the judiciary that only Congress could prescribe remedies for copyright infringement. *See Appendix "A"* at 10-11.

The following quote from *Belmont*, however, amply illustrates that the Ninth Circuit created a judicial remedy for copyright infringement by holding that such conduct is within Sections 2314 and 1341:

"We recognize that in *Drebin* the original copyrighted works were in fact stolen, where as here, most of the copying was 'off the air' with no proof of interstate transportation of stolen originals. The distinction between 'off the air' copying and the stealing of original copyrighted works was the basis upon which the *Smith* Court distinguished *Drebin*. (Citation). We do not find the distinction meaningful in terms of the purpose of the statute. The evil which Congress addressed in the National Stolen Property Act was the interstate traffic in stolen property. The rights of

copyright owners in their protected property are just as deserving of protection from interstate transportation as are the ownership interests of those who own other types of property. *When society creates new kinds of property and thieves devise new ways of appropriating that property to their own use, the law against transporting property expands with the growth in the varieties of property.* There is no utility in the sort of sterile formality urged upon us by these defendants. *A large percentage of the world supply of entertainment property is generated within this Circuit. If, indeed, the Fifth Circuit takes a different view of the matter, we are not bound to follow it.*"

715 F.2d at 461-462 (emphasis added.) In spite of the Supreme Court's clear pronouncement in *Sony* that it is not for the Circuit Courts to promulgate their own views as to the proper remedy for copyright infringement, the Ninth Circuit did so in relying on *Belmont* to affirm petitioner's conviction under 18 U.S.C. § 1341 and 2314. The different results reached by the Ninth Circuit and the Fifth Circuit demonstrate that reasonable minds will differ as to the proper remedy for copyright infringement. Compare *United States v. Belmont*, 715 F.2d 459 (9th Cir. 1983), cert. denied, 104 S.Ct. 738 (1984) with *United States v. Smith*, 686 F.2d 234 (5th Cir. 1982). The different results reached by the Fifth Circuit and the Ninth Circuit with respect to the proper course of action for remedying copyright infringement illustrate that the proper remedy should be left to the elected representatives of Congress. Because the Fifth and Ninth Circuits have chosen different courses of action with respect to the same issue, guidance from the Supreme Court is necessary.

A(1) There is No Clear Indication From Either the Statutory Language or the Legislative History of the National Stolen Property Act (NSPA) and the Mail Fraud Statute That Congress Intended Application of These Statutes to Conduct Constituting Copyright Infringement.

In *United States v. Smith*, 686 F.2d 234, 244-46 (5th Cir. 1982), the Fifth Circuit undertook an exhaustive analysis of the legislative history of the NSPA, 18 U.S.C. § 2314. In summary, the Fifth Circuit observed:

"The NSPA was an extension of the National Motor Vehicle Theft Act (citation) (NMVTA), which was passed in response to the growing number of automobile thefts in the United States. . . . In addition, at no time was it suggested that the 1934 statute should be applicable to anything other than tangible property that was stolen, converted, or taken by fraud as those terms were, and are, commonly used and understood Consequently, the legislative history of the 1934 NSPA fails to provide necessary evidence that Congress was aware of the statute's claimed scope. (citation.) Indeed, copyrights and copyright infringement were never mentioned in the legislative history of the NSPA If Congress really intended to enact a statute broad enough to encompass copyright infringement, 'it did so with a peculiar choice of language and in an unusually backhanded manner. [The NSPA] was not necessary to interdict [the interstate infringement of copyrights], for as Congress surely knew, [copyright infringement] already [was] addressed in comprehensive fashion by [other federal] law.' (Citation.) Consequently, the 'legislative history does not demand a broader reading of the statute' than the statutory language apparently requires. (footnote and citation omitted.)"

686 F.2d at 244-46 (emphasis added). Based on the above analysis, the Fifth Circuit concluded that Section 2314 could not be used to prosecute acts of copyright infringement.

The Fifth Circuit's reasoning in *Smith* is equally applicable to an analysis of the legislative history of the mail fraud statute, e.g. 18 U.S.C. § 1341. The legislative history of Section 1341 demonstrates that Congress never considered copyrights or copyright infringement to be within the scope of the mail fraud statute. Nevertheless, in considering Mr. Dowling's argument that the mail fraud statute does not reach copyright infringement, the Ninth Circuit Court of Appeals, relying on its decision in *Belmont*, gave an expansive interpretation of the mail fraud statute and rejected Mr. Dowling's argument.

A(2) The District Court's Ruling and the Ninth Circuit Decision That Acts of Copyright Infringement May Also Come Within The Purview of Mail Fraud and NSPA Statutes Impermissibly Increased Criminal Penalties for Copyright Infringement Beyond That Prescribed by Congress in the Copyright Act

Mr. Dowling respectfully contends that the Ninth Circuit's decision in *United States v. Belmont*, which interprets Section 2314 to encompass copyright infringements, and the Ninth Circuit's decision with respect to Mr. Dowling's appeal, which interprets Section 1341 to proscribe copyright infringement, impermissibly increase the criminal penalties for such conduct beyond that prescribed by Congress in the Copyright Act, 17 U.S.C. § 506(a) and (b), and the amendment to the NSPA, 18 U.S.C. § 2319(a). The Fifth Circuit in *United States v. Smith*, 686 F.2d 234 (5th Cir. 1982), succinctly addressed this issue with respect to Section 2314 as follows:

"The most striking lesson to be learned from the passage of the 1976 Copyright Act is Congress' obvious refusal to allow copyright infringing activity to be punished by felony provisions. To be sure, such provisions are an integral part of Section 2314 and

precisely the reason the Government chose to prosecute defendant Smith under the NSPA. *Equally striking is the fact that the 1976 Copyright Act makes no distinction between copyright infringing activity that implicates interstate commerce or is purely intrastate in nature.* (Footnote omitted.) Of course, the interstate nature of the wrongful activity is the element that gives life to § 2314; it was the element that prompted Congress to federalize many local crimes.

Nevertheless, the Copyright Act of 1976 was intended to be a comprehensive treatment and revision of the copyright laws . . . Both the Senate and House Reports set out in detail the extent of research and study that took place in order to provide for the general and extensive revision of the law . . . *Significantly, the NSPA's interstate commerce and felony punishment provisions were not mentioned in the reports.*"

686 F.2d at 246-47 (emphasis added.)

The Court in *Smith* next observed that before the passage of the Copyright Act of 1976, Congress was urged by the president of the Motion Picture Association of America to increase the imprisonment term for violations of 17 U.S.C. § 506 (film and tape piracy) and 18 U.S.C. § 2318 (counterfeit labelling) to a maximum of three years imprisonment for a first offense and to seven years imprisonment for a second or subsequent offense. The final version of the Act, however, rejected the specifically requested felony provision and incorporated misdemeanor penalties except for second offenders (maximum for two years imprisonment). The *Smith* Court observed:

"It was in this specific and particular context of copyrights that Congress chose *not* to distinguish between copyright infringement implicating interstate or intrastate commerce and chose *not* to invoke

felony provisions."

686 F.2d at 248 (emphasis added).

Thus, all the years of Congressional debate concerning Section 506 of the Copyright Act (misdemeanor penalties for criminal infringement) were for naught if all the while the Congress believed that copyright infringement was also subject to the ten year penalty of Section 2314 and/or, where the mails are utilized, to the five year imprisonment penalty of the mail fraud statute. *E.g.* 18 U.S.C. § 1341.

This analysis is supported by Congress' most recent attack on the pirating of copyrighted works. On May 24, 1982, the President signed into law the Piracy and Counterfeiting Amendment Acts of 1982, PUB. L. No. 97-180, 96 Stat. 91 (1982). The stated purpose of the Act is to strengthen the law against record, tape, and film piracy and counterfeiting by "increas[ing] the penalties for trafficking and counterfeit labels for copyrighted records, tapes and audio visual works and for copyright infringements involving such products." S. Rep. No. 97-274, 4 U.S. Code Cong. & Ad. News (1982) at 127.

The Piracy Act provides a graduated punishment scheme for various copyright infringing activities. This was accomplished by adding yet another new section to the stolen property chapter containing the NSPA, 18 U.S.C. § 2314, and by modifying 18 U.S.C. § 2318 which was originally added to the "stolen property" chapter by the Copyright Act of 1926. The new Section 2319, which sets forth the penalties for violations of 17 U.S.C. § 506 (criminal copyright infringement), provides a penalty scheme under which defendant's acts, *e.g.* copyright infringement not involving sound recording, still carry only the misdemeanor penalties set forth in § 2319(b)(3)¹

¹The pertinent portions of the penalty scheme are as follows: (1) up to five years incarceration and/or a \$250,000 fine for producing or distributing, within a 180-day period, 1,000 or more phonorecords infringing the copyright in sound recordings or 65 copies infringing the copyright in motion pictures; (2) up to two years imprisonment and/or a \$250,000 fine for producing or distributing, within a 180-day

If, as the Ninth Circuit concluded, *see, e.g.*, Appendix "A" at 9-10, Section 2314 of the NSPA or the mail fraud statute proscribes copyright infringement, the Piracy and Counterfeiting Amendments Act of 1982 would have been unnecessary. As stated by the Fifth Circuit in *United States v. Smith*:

"The necessity for these increased punishment provisions was Congress' apparent belief that no felony punishment provisions applied to copyright infringing activities, including the interstate trafficking of pirated works . . . This recent Congressional activity in the area of copyright infringement demonstrates Congress felt a significant need to provide more stringent punishment for various forms of infringement. The specific 1976 Copyright Act, although a comprehensive revision of copyright law, failed to provide the necessary punitive measures. *Of course, the Piracy and Counterfeiting Amendment Act of 1982 would have been unnecessary if the NSPA § 2314 which provides for a \$10,000 fine and/or 10 years imprisonment were available.*

The legislative history of the NSPA § 2314 -- together with the lessons to be learned from passage of the 1976 Copyright Act and the recent Piracy Act -- *provide no basis for this Court to find the activity of defendant Smith to be in conflict with the provisions of § 2314. Indeed, a contrary result is mandated. Of course, this is consistent with a logical and common sense reading of the NSPA's statutory language. It would be a major encroachment upon Congress' lawmaking prerogative to say the activity falls within § 2314.* (Footnote omitted).

686 F.2d 234, 248-49 (emphasis supplied).

period, of more than 100, but less than 1,000 phonorecords infringing the copyright in sound recordings, or more than 7, but less than 65 copies infringing the copyright in motion pictures; and (3) up to one year imprisonment and/or a \$25,000 fine in any other case. *See, e.g.*, 18 U.S.C. § 2319(b)(1)-(3).

**B. Basic Principles of Statutory Construction
Compel the Conclusion That Copyright In-
fringement is Not Encompassed by 18 U.S.C.
§ §2314 and 1341**

The foregoing analysis demonstrates Congress' clear intent and belief that criminal copyright infringement and counterfeiting are covered specifically by the Copyright and Piracy Acts, 17 U.S.C. §506, 18 U.S.C. §2318 and §2319, and *not* by such general statutes as 18 U.S.C. §2314 and 1341. In addition, several well-settled principles of statutory interpretation lead to the same conclusion. The first principle is that where a general statute might be construed to relate to the same subject as a more specific statute, the specific statute should apply to the exclusion of the general. *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973); *Kniess v. United States*, 413 F.2d 752 (9th Cir. 1969). In short, these cases stand for the proposition that where a defendant's conduct falls within the literal language of either of two statutes, one specific and one general, the government must prosecute such conduct under the specific statute.

A second principle of statutory construction applicable here is that where ambiguity exists regarding Congress' intent as to which statute applies, the principle of lenity mandates that any such ambiguity must be resolved in favor of the less severe statute. *Williams v. United States*, ___ U.S. ___, 102 S.Ct. 3088 (1982). *Simpson v. United States*, 435 U.S. 6, 14 (1978).

As in *Williams*, Mr. Dowling's conduct has been addressed in comprehensive fashion by laws *other* than those sought to be utilized by the government. Also as in *Williams*, the language of neither 18 U.S.C. §2314 nor 18 U.S.C. §1341 explicitly reaches the conduct in question. Consequently, "[i]t 'slights the wording of the statute,' (citation)" *Williams*, ___ U.S. at ___, 102 S.Ct. at 3092, to contend that the infringement of an intangible copyright involves "goods, wares, or merchandise" within the meaning of Section 2314 or that the mere act of infringing amounts to "stealing, converting, or taking by fraud"

within the meaning of the statute. Likewise, it severely slights the wording of the mail fraud statute, 18 U.S.C. §1342, to hold that copyright infringement in any manner involves the making of false statements, representations, or omissions intended to deceive — the elements inherent in the "scheme or artifice to defraud" requirement of the statute.

In short, a common sense reading of either statute does not lead to the conclusion that copyright infringement is prohibited. As the Supreme Court has emphasized in another context, " 'when choice has to be made between two readings of what conduct Congress had made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.' (citations and footnote omitted.)" *Williams*, 102 S.Ct. at 3095.

Given the extreme ambiguity of Sections 2314 and 1341 insofar as they apply to copyright infringement, and given the clear applicability of the relevant provisions of the Copyright Act, it is major encroachment on Congress' law making prerogative for the Ninth Circuit to apply the harsher alternative of Sections 2314 and 1341 to Mr. Dowling's copyright infringement activity.

II

**THE NINTH CIRCUIT'S DECISION THAT
COPYRIGHT INFRINGEMENT ACTIVITIES
ARE PROHIBITED BY 18 U.S.C. §2314 IS
INCONSISTENT WITH EXISTING NINTH
CIRCUIT PRECEDENT AND THE UNITED
STATES SUPREME COURT'S DECISION IN
SONY CORPORATION V. UNIVERSAL STU-
DIOS, ___ U.S. ___, 104 S.Ct. 774 (1984)**

In *United States v. Carman*, 577 F.2d 556 (9th Cir. 1978), the Ninth Circuit refused to extend Section 2314 to a fraudulent scheme which reduced another's wealth by placing money out of the reach of creditors. The Ninth Circuit held that conduct which places money out of the reach of creditors does

not constitute stealing, conversion or taking by fraud within the meaning of Section 2314. The *Carman* Court reasoned that the specificity of another statute covering the conduct at issue therein strongly suggested that the restrictive interpretation of Section 2314 “‘should *not* be expanded at the government’s will beyond the connotation — depriving an owner of his rights and property — conventionally called to mind.’” 577 F.2d at 565 (citation omitted) (emphasis added). The Court refused to make criminal a form of commercial dishonesty because ambiguities in criminal statutes are resolved in a defendant’s favor. *Id.*

Similarly, specific statutes other than Section 2314 cover the conduct constituting criminal copyright infringement at issue here. *See, e.g.*, 17 U.S.C. § 506(a); 18 U.S.C. § § 2318-2319. The specificity of these statutes strongly suggests that the restrictive interpretation of Section 2314 should not be expanded to encompass conduct beyond the connotation given by the *Carman* Court. Thus, the expansive interpretation given to Section 2314 by the Ninth Circuit in *Belmont* is inconsistent with its prior decision in *Carmen*.

This is especially true here because conceptual inconsistencies exist between the reference in Section 2314 to “goods, wares, [and] merchandise that have been stolen, converted or taken by fraud” and the nature of copyright infringement. First, an intangible property right such as a copyright, is not a “good” within the meaning of the Uniform Commercial Code. *See Cal. Comm. Code* § 2105 (West 1964) and § 9106 (West Sup. 1983) (“‘general and tangible’ means any personal property (including things in action) other than *goods*, accounts . . . and money”) (emphasis added). Under the *Belmont* Court’s interpretation of Section 2314 as including all personal property that is ordinarily a subject of commerce, *see, e.g.*, 715 F.2d at 461 n.1, interference with another’s contract right or chosen action could also be the subject of a Section 2314 conviction.

In *Sony*, however, the Supreme Court explained that the nature of the ownership interest of one who holds a copyright is vastly *different* from one who owns tangible property. The

Copyright Act grants the holder of a copyright the exclusive right to use and to authorize the use of the work, including reproduction, in qualified ways. *Sony*, ____ U.S. ____ at ____, 104 S.Ct. at 784 & n.13. Unlike the law governing tangible property, copyright protection has never accorded the copyright owner complete control for all possible uses of the work. *Id.* All reproductions of the work are not within the exclusive domain of the copyright owner; any individual may reproduce a copyrighted work for a fair use and the owner does not possess the exclusive right to fair use. *Id.* Consequently, a violation of copyright is conceptually different from stealing someone’s tangible property.

In fact, in *Sony*, the Supreme Court explained that a violation of the copyright holder’s exclusive right — that is, an infringement of the right — is a *trespass* into the author’s exclusive rights. Because not every taking or use of a copyrighted material is a trespass, the Supreme Court rejected an analogy between stealing jewelry and the use of VCR’s to record programs for later use at home. The Supreme Court reasoned as follows:

“The premise and the analogy are indeed simple, but they add nothing to the argument. *The use to which stolen jewelry is put is quite irrelevant in determining whether depriving its true owner of his present possessory interest in it is venial; because of the nature of the item and the true owner’s interest in physical possession of it, the law finds that taking objectionable even if the thief does not use the item at all.* Theft of a particular item of personal property of course may have commercial significance, for the thief deprives the owner of his right to sell that particular item to any individual. Time shifting does not even remotely entail comparable consequences to the copyright owner . . .”

____ U.S. ____ at ____, 104 S.Ct. at 793 n.33 (emphasis added).

Mr. Dowling respectfully contends that these remarks demonstrate the inappropriateness of analogizing stolen goods and copyright infringement. With respect to the latter, the use to

which the copyright is put determines whether or not a trespass — an infringement — has occurred, while in the former, the mere fact of taking or deprivation constitutes stealing within the meaning of Section 2314. Interference in the nature of trespass is not stealing, conversation or taking by fraud as that term has been construed. *Cf. United States v. Turley*, 352 U.S. 407 (1957) (the term “stolen” in the Dryer Act, 18 U.S.C. § 2313, which prohibits transporting stolen motor vehicles across interstate lines, encompasses felonious takings accomplished by embezzlement, false pretenses and conversion.)

Here, the stipulated facts reveal that there is no evidence that Mr. Dowling knew that the original recordings were stolen. Thus, the fact that Mr. Dowling may have known that his conduct was illegal because it violated another’s copyright hardly proves that he knew that the original recordings were stolen. Consequently, the District Court erred in concluding that Mr. Dowling’s acts of copyright infringement also constitute interstate transportation of stolen property within the meaning of 18 U.S.C. § 2134.

III

PETITIONER’S CONDUCT CONSTITUTING COPYRIGHT INFRINGEMENT IS NOT, AS A MATTER OF LAW, SUFFICIENT TO SUSTAIN A CONVICTION FOR MAIL FRAUD PURSUANT TO 18 U.S.C. § 1341

As noted earlier, Section 1341 should not be construed to encompass conduct constituting copyright infringement, absent clear legislative guidance by Congress. Moreover, relevant case law interpreting the mail fraud statute demonstrates that conduct constituting copyright infringement does not, as a matter of law, come within the purview of Section 1341.

In order to prove the offense of mail fraud, the Government must show that the accused participated in a scheme to defraud and caused a use of the mail for the purpose of executing the scheme. *Pereiar v. United States*, 347 U.S. 1, 8 (1954). Both the Fourth Circuit and the Ninth Circuit have held that § 1341

should be carefully and strictly construed in order to avoid extension beyond the limits intended by Congress. *See, e.g., United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979) *cert. denied*, 445 U.S. 961; *United States v. Kelem*, 416 F.2d 346 (9th Cir. 1969), *cert. denied*, 397 U.S. 952. The Ninth Circuit nevertheless refused to apply this principle to Mr. Dowling’s case.

In upholding Mr. Dowling’s mail fraud conviction, the Ninth Circuit relied on precedent establishing that a nondisclosure or concealment may serve as a basis for the fraudulent scheme requirement in Section 1341. *See, e.g., Appendix “A”* at 7-8. In so doing, the court recognized that existing precedent in the Ninth Circuit had applied Section 1341 to fraudulent schemes involving nondisclosure only where a fiduciary relationship exists between the person who fails to disclose and the person to whom disclosure is owed. *See Appendix “A”* at 7-8. In these instances, the fiduciary duty of disclosure is breached through the fraudulent scheme.

In Petitioner’s case, the Ninth Circuit extended application of Section 1341 even though he did not breach any *fiduciary* duty of disclosure. To reach this result, the Court created a new “duty of disclosure”, the breach of which will now sustain a Section 1341 conviction. The court held that Section 1341 prohibits a fraudulent scheme which violates an independent explicit statutory duty to disclose created by the legislature. *See Appendix “A”* at 9. The court then held that 17 U.S.C. § 115 creates an independent duty of disclosure to copyright holders from those who wish to manufacture and distribute copyrighted materials. Because Mr. Dowling mailed catalogues advertising his phonorecords without disclosing his intent to manufacture and distribute them, the court reasoned that Mr. Dowling breached his independent statutory duty to disclose set forth in 17 U.S.C. § 115. *See Appendix “A”* at 8-10. The Court then concluded that Mr. Dowling’s breach of this independent statutory duty through nondisclosure properly formed the basis of a scheme to defraud under the mail fraud statute. *Id.* This result, however, is in conflict with *United States v. Brewer*, 528

F.2d 492 (4th Cir. 1975), relied upon by the Ninth Circuit, and *United States v. Gallant*, 570 F.Supp. 303 (S.D.N.Y. 1983), distinguished by the Ninth Circuit. See, e.g., Appendix "A" at 9-11.

The Ninth Circuit relied on *United States v. Brewer*, 528 F.2d 492 (4th Cir. 1975) as authority for its independent statutory duty analysis. See Appendix "A" at 7-8. The Ninth Circuit characterized the *Brewer* Court as holding that the breach of the independent explicit statutory duty of the Jenkins Act² to register and to provide information to the Florida tax authorities was sufficient to form the basis of a scheme to defraud under the mail fraud statute. *Id.* at 496. The Ninth Circuit's reliance on *Brewer* for this proposition, however, is misplaced. *Brewer* relied on the violation of the Jenkins Act to uphold the District Court's finding of *intent*. 528 F.2d at 496. The Court stated:

"Although using the mails for the interstate sale of cigarettes or other lawful merchandise is in itself an innocent act, it becomes fraudulent when the seller couples it with an intent to transact business in a way that enables his customers to escape taxes by dealing with him. Then it becomes, as the legislative history of the Jenkins Act notes, a form of tax evasion. (Footnote omitted.) There is no doubt that *Brewer* intended to sell cigarettes, free of Florida taxes, to Florida residents. . . . Her willful decision not to comply with the Jenkins Act furnishes additional evidence of her intent to ship cigarettes from North Carolina to Florida, knowing that Florida could not readily detect the sales and collect the taxes that were owed by her customers.

* * *

It is enough that she knowingly devised a scheme that would enable Florida residents to obtain cig-

²The Jenkins Act, 15 U.S.C. § 376, requires a person who sells or transfers for profit cigarettes in interstate commerce to register as a cigarette seller.

arettes without declaring them for taxation. . . ."

Id.

The foregoing quote demonstrates that the *Brewer* Court did not premise its decision upholding the mail fraud conviction on a finding of a breach of an independent explicatory statutory duty. Rather, the *Brewer* Court explained that the precise reason why using the mails for the interstate sale of cigarettes or other lawful merchandise becomes criminal for purposes of Section 1341 is because it is coupled with an intent to transact business in a way that enables customers to escape paying taxes by purchasing cigarettes from the seller. 528 F.2d at 496. Thus, the defendant's failure to register as a cigarette seller in violation of law was *not* construed to be a breach of an independent statutory duty that would *alone* support a conviction for mail fraud.

Brewer does not support the conclusion that a mere failure to disclose distribution to copyright holders, coupled with the use of the mails, is sufficient for a Section 1341 conviction. The scheme at issue here, unlike the scheme in *Brewer*, did not enable customers to escape paying royalties; there is no evidence that the copyright infringement scheme here enabled customers to receive copyrighted materials at substantial savings. Rather, Mr. Dowling's action, at most, deprived the copyright holders of potential royalties or licensing fees from Mr. Dowling — conduct that is specifically punishable under another section of Title 18. See, e.g., 18 U.S.C. § 2318(c)(2) (use of mails in offense). Thus, *Brewer* is distinguishable from the case at bar. Consequently, the Ninth Circuit's conclusion that a scheme to defraud may be premised, for purposes of Section 1341, upon the breach of the "independent statutory duty", see Appendix "A" at 8, to report an intent to manufacture and distribute recordings is not supported by *Brewer*. Under the Ninth Circuit's interpretation, the presence of illegal conduct alone may constitute the basis of the "fraud" element of a mail fraud prosecution. Any violation of statute will support the fraud element under the Ninth Circuit's interpretation.

The Ninth Circuit also relied on the reporting requirements of 17 U.S.C. § 115 to distinguish *United States v. Gallant*, 570 F.Supp. 303 (S.D.N.Y. 1983). See Appendix "A" at 8-9. In *Gallant*, the Court held that defendant's failure to disclose his intention to distribute recordings of copyrighted musical performances to copyright owners was *insufficient* to sustain a mail fraud conviction. *Id.* at 310. The Ninth Circuit reasoned that because Gallant did not manufacture the phonorecords, but rather only distributed them, the reporting requirements of § 115 were inapplicable. Thus, under the Ninth Circuit's view, Gallant did not breach the explicit independent statutory duty in Section 115, and therefore he did not employ a scheme to defraud. Appendix "A" at 9.

The Ninth Circuit's distinction is without substance. Section 115 provides that notice shall be given before *manufacture and distribution*.³ Since the statute requires notice before distribution, then under the Ninth Circuit's analysis, Gallant necessarily breached the "explicit independent statutory duty", by failing to disclose his distribution. The decision in *Gallant* simply cannot be reconciled with the result reached by the Ninth Circuit in the instant case.

³17 U.S.C. § 115 provides in pertinent part:

"(b) Notice of intention to obtain compulsory license —

(1) Any person who wishes to obtain a compulsory license under this section shall, *before or within thirty days after making, and before distributing any phonorecords of the work*, serve notice of intention to do so on the copyright owner . . .

(2) Failure to serve or file the notice required by clause (1) forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders *the making and distribution* of phonorecords actionable as acts of infringement under § 501 and fully subject to the remedies provided by §§ 502 through 506 and 509. Significantly, this section is devoid of any reference to the mail fraud statute." (emphasis added).

In sum, the effect of the Ninth Circuit's interpretation of the mail fraud statute is to allow any statutory violation alone to be the basis of the fraud element of a mail fraud conviction; thus, the potential of bringing almost any illegal act within the province of the mail statute is now a reality. Such an expansive view of Section 1341 is inconsistent with principles of statutory construction, the language and legislative history of the act, and existing precedent. Petitioner requests this Court to grant the Petition for Certiorari and resolve the conflict.

CONCLUSION

For the foregoing reasons, Petitioner Dowling respectfully submits that the Petition for Certiorari should be granted.

Respectfully submitted,

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PAUL EDMOND DOWLING

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	
Plaintiff-Appellee,)	NO. 83-5153
vs.)	D.C. #CR-82-
PAUL EDMOND DOWLING,)	1005(B)-2-R
Defendant-Appellant.)	

Appeal from the United States District Court
for the Central District of California
Lawrence T. Lydick, District Judge, Presiding
Argued and submitted May 11, 1984

Before: CHAMBERS, TANG and BOOCHEVER, Circuit Judges.
TANG, Circuit Judge.

I.

OVERVIEW

This case involves the unauthorized production and distribution of record albums containing copyrighted material performed by Elvis Presley. Appellant Paul Edmond Dowling appeals his felony convictions of mail fraud, interstate transportation of stolen property, and conspiracy to transport stolen property interstate. Dowling makes three arguments on appeal: (1) use of the mails to advertise copyright infringing material is not a use of the mail in furtherance of a scheme to defraud as required by the mail fraud statute; (2) interstate transportation of copyrighted material is not transportation of goods, wares or merchandise within the meaning of the National Stolen Property Act; and (3) certain testimony of a government witness offered to show intent was inadmissible hearsay, and the district court's admission of that evidence was reversible error. We reject Dowling's arguments and affirm his felony convictions.

II. FACTS

Beginning in 1976, Dowling and co-defendant William Samuel Theaker, aka Vic Colonna, began manufacturing and distributing "bootleg" Elvis Presley phono records — phono records made without the consent of the copyright proprietors. Dowling and Theaker made seven unauthorized albums: one from a concert tape, one from the sound tracks of two Presley motion pictures, and the others from studio "out takes"¹ and tapes of Presley television appearances. The copyright proprietors never authorized release of the master recordings or out takes. The current recordings and at least one out take were obtained by assuring the owner that they were for personal use only.

At the direction of both Dowling and Theaker, Send Service, an addressing and mailing service located in Glendale, California, mailed over 50,000 catalogs and flyers advertising defendants' phonorecords. The catalogs were mailed throughout the United States during 1979 and 1980. Theaker collected the orders and then sent them to Dowling who mailed the requested albums from Maryland.

Defendants conducted a massive business. Two Maryland Post Office employees testified that during 1979-80 Dowling mailed hundreds of packages of albums every week. The mailings ranged from one record to packages weighing 20 to 30 pounds each. Dowling was spending at least \$1,000 per week on postage during this period.

To give the albums an air of legitimacy, defendants used fictitious record labels, "Audifon" and "Amiga", and had the labels printed in Germany. Dowling and Theaker also printed across the bottom of the package: "ALL RIGHTS RESERVED. UNAUTHORIZED DUPLICATION IS A VIOLATION OF APPLICABLE LAWS."

¹"Out takes" are portions of tape not used in the original edited broadcast.

On March 22, 1983, Dowling and co-defendants Theaker and Richard Minor were charged in a twenty-seven count second superseding indictment with conspiracy to transport stolen property interstate in violation of 18 U.S.C. § 371² [Count One]; interstate transportation of stolen property in violation of 18 U.S.C. § 2314³ [Counts Two through Nine]; copyright infringement in violation of 17 U.S.C. § 506(a)⁴ [Counts Ten through Twenty-Four]; and mail fraud in violation of 18 U.S.C. § 1341⁵ [Counts Twenty-Five through Twenty-Seven].

²18 U.S.C. § 371 provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

³18 U.S.C. § 2314 provides in pertinent part:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . [s]hall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

⁴17 U.S.C. § 506(a) provides:

Criminal Infringement. - Any person who infringes a copyright willfully and for purposes of commercial advantage shall be punished as provided in section 2319 of Title 18.

⁵18 U.S.C. § 1341 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing

The district court severed Dowling's trial from the trial of his co-defendants, and Dowling waived his right to a jury trial. The court found Dowling guilty of all counts against him⁶ and sentenced him to a cumulative prison term of eighteen months: nine concurrent one-year terms on the misdemeanor copyright violations and three concurrent six-month terms on the three felony mail fraud counts. The court additionally placed Dowling on probation for five years on condition that he pay a \$5,000 fine and perform fifteen hundred hours of community service. Dowling appeals from the felony convictions.⁷

III.

DISCUSSION

A. Scope of the Mail Fraud Statute

Dowling does not dispute the district court's factual findings that he mailed catalogs advertising his bootleg phonorecords. Rather, he argues that as a matter of law his mailing of the catalogs is not punishable under the mail fraud statute, 18 U.S.C. § 1341. Since the applicability of the mail fraud statute to Dowling's conduct is a pure question of law, we review de novo the district court's determination that such a conviction was proper. *See United States v. Moreno-Pulido*, 695 F.2d 1141, 1143 (9th Cir. 1983).

such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

⁶Counts Nineteen through Twenty-Four did not involve Dowling.

⁷Dowling does not appeal from his copyright infringement convictions.

RCA Records (RCA) has the exclusive right to manufacture and distribute Elvis Presley sound recordings produced after July 26, 1954 (whether or not the recordings have been released). Under the terms of a 1973 contract, Presley's estate has the right to receive royalties, through RCA, on all Presley recordings made after March 1, 1973. Dowling does not dispute the fact that he had an obligation under 17 U.S.C. § 115⁸ of the Copyright Act to report to RCA his intent to manufacture and distribute Elvis Presley phonorecords. He argues, rather, that the government can only prosecute him under the Copyright Act, 17 U.S.C. § 506(a), for his failure to report and that the government impermissibly prosecuted him under the Mail Fraud Statute.

We find Dowling's argument without merit. In *United States v. Belmont*, 715 F.2d 459 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1275 (1984), the court was faced with a similar argument in relation to the applicability of the National Stolen Property Act, 18 U.S.C. § 2314, to acts of copyright infringement. The *Belmont* court rejected appellant's argument that Congress intended to limit the prosecution of infringing acts specifically to the criminal infringement provisions of the Copyright Act, 18 U.S.C. § 506(a). Rather, in *Belmont* the court noted that the recent Piracy and Counterfeiting Amendments Act of 1982, Pub.L. No. 97-180, 96 Stat. 91, evidences

⁸17 U.S.C. § 115 provides in pertinent part:

(b) Notice of Intention to Obtain Compulsory License.-

(1) Any person who wishes to obtain a compulsory license under this section shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of intention to do so on the copyright owner. . . .

(2) Failure to serve or file the notice required by clause (1) forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506 and 509.

Congress' intent to permit prosecutions under other applicable statutes. As stated in Section 2319(a) of the Piracy Amendments:

Whoever violates section 506(a) . . . shall be punished as provided in subsection (b) of this section *and such penalties shall be in addition to any other provisions of title 17 or any other law.*

(emphasis added). The *Belmont* court concluded that while the wrongful copying of sound and video tapes and motion picture materials constituted copyright infringement, the interstate transportation of the stolen copies was also punishable under Section 2314 of the National Stolen Properties Act. *Id.* at 462.

We find the *Belmont* rationale applicable to the case before us. Dowling has advanced no evidence that Congress intended to provide Section 506 of the Copyright Act as the exclusive prosecutorial route with which to punish individuals who infringe copyrights. If the government can prove the requisite elements to support a mail fraud conviction in relation to Dowling's activities, we find nothing in the Copyright Act to prohibit prosecution of those acts under the Mail Fraud statute.

Dowling next argues that the government failed to establish that his acts constituted mail fraud under 18 U.S.C. § 1341. To prove mail fraud, the government must show that the accused participated in a scheme to defraud, and caused a use of the mails for the purpose of executing the scheme. *Pereira v. United States*, 347 U.S. 1, 8 (1954); *United States v. Kaplan*, 554 F.2d 958, 965 (9th Cir.), *cert. denied*, 434 U.S. 956 (1977). Dowling does not dispute the fact that his catalog mailings constituted a "use" under the terms of the statute.

1. **Scheme to Defraud.** It is settled in this Circuit that a scheme to defraud need not be an active misrepresentation. A nondisclosure or concealment may serve as a basis for the fraudulent scheme. *See United States v. Buckley*, 689 F.2d 893, 897-98 (9th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 1778 (1983); *United States v. Bohonus*, 628 F.2d 1167, 1172 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980).

Dowling does not contest the fact that he concealed his activities from the copyright holders with the intent to deprive them of their royalties. Dowling argues, however, that the law in this Circuit is that non-disclosure may serve as a basis for the fraudulent scheme only when there is a fiduciary relationship between the person who fails to disclose and the person to whom disclosure is owed. He points out that the cases in this Circuit that hold that concealment may constitute fraud all involve a fiduciary type relationship. *See Buckley*, 689 F.2d at 898 (involving a public official's fiduciary duty to the citizenry); *Bohonus*, 628 F.2d at 1172 (involving an employee's deceitful concealment of secret profits from his employer); and *Cacy v. United States*, 298 F.2d 227, 229 (9th Cir. 1961) (involving a seller's concealment of material facts to a buyer).

The government argues, on the other hand, that there is no sound basis to limit non-disclosure fraudulent schemes to situations in which there exists a fiduciary duty. The government intimates that the presence of illegal conduct alone may constitute the basis of the "fraud" element of a mail fraud prosecution.

We decline to adopt the "fiduciary duty" limitation advanced by Dowling nor can we accept the sweeping construction proposed by the government. Rather, we conclude that a non-disclosure can only serve as a basis for a fraudulent scheme when there exists an independent duty that has been breached by the person so charged. This independent duty may exist in the form of a fiduciary duty to third parties, *see Buckley*, 689 F.2d at 898; *Bohonus*, 628 F.2d at 1172; and *Cacy*, 298 F.2d at 229, or may derive from an independent explicit statutory duty created by legislative enactment. *See United States v. Brewer*, 528 F.2d 492 (4th Cir. 1975).

In *Brewer*, the defendant made mail order sales of cigarettes from North Carolina to Florida. In doing so, she violated the Jenkins Act, 15 U.S.C. § 376,⁹ by failing to register as a

⁹15 U.S.C. § 376, provides in pertinent part:

(a) Any person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes

cigarette seller with Florida officials and by failing to furnish copies of certain invoices. *Id.* at 495. The *Brewer* court found that the breach of the independent explicit statutory duty of the Jenkins Act to register and to provide information to the Florida tax authorities was sufficient to form the basis of a scheme to defraud under the Mail Fraud Statute. *Id.* at 496.

The case before us is similar to the *Brewer* fact pattern. Dowling concedes that 17 U.S.C. § 115 of the Copyright Act created an explicit independent statutory duty to report to RCA his intent to manufacture and distribute Elvis Presley recordings. His mailing of the catalogs without disclosing his intent to manufacture and distribute the Presley phonorecords amounted to a breach of the statutory duty created by Section 115. We find that Dowling's breach of this independent statutory duty through his nondisclosure may form the basis of a scheme to defraud under the Mail Fraud Statute.

The result in *United States v. Gallant*, 570 F. Supp. 303 (S.D.N.Y. 1983), does not suggest a different result. In *Gallant*, the court held that defendant's failure to disclose his intention to *distribute* recordings of copyrighted musical per-

are shipped into a State taxing the sale or use of cigarettes, to other than a distributor licensed by or located in such State, or who advertises or offers cigarettes for such a sale or transfer and shipment, shall —

(1) first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement or offer is disseminated a statement setting forth his name and trade name (if any), and the address of his principal place of business and of any other place of business; and

(2) not later than the 10th day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.

formances to copyright owners was insufficient to prosecute him under the Mail Fraud Statute. *Id.* at 310. However, in *Gallant*, the defendant was a middleman distributor and not a manufacturer. *Id.* at 307. Because *Gallant* did not make the albums, the reporting requirements of 17 U.S.C. § 115 were inapplicable. *Id.* Thus, in *Gallant*, unlike the present case, there did not exist the breach of an explicit independent statutory duty upon which to base a scheme to defraud.

In conclusion, we stress that the narrowness of our holding permits nondisclosures to form the basis of a scheme to defraud only when there exists an independent duty (either fiduciary or derived from an explicit and independent statutory requirement) and such a duty has been breached. To hold otherwise that illegal conduct alone may constitute the basis of the fraud element of a mail fraud conviction would have the potential of bringing almost any illegal act within the province of the mail fraud statute.

2. Use of the Mails in Furtherance of the Scheme to Defraud. Dowling argues that even if his failure to disclose his intention to make and distribute albums was a scheme to defraud the copyright owners of their royalty fees, his mailing catalogs to advertise the albums was not "in furtherance" of the scheme. He contends that the mailings to potential customers could not further a scheme to deprive the copyright owners of their royalties. We find Dowling's argument unpersuasive.

A mailing need not be from the perpetrator to the victim to be in furtherance of the scheme to defraud. *See Pereira*, 347 U.S. at 8 (mailing was from one bank to another, victim was defendant's wife); *Brewer*, 528 F.2d at 497 (mailing was from defendant to Florida cigarette buyers, victim was the State of Florida); *United States v. International Term Papers, Inc.*, 477 F.2d 1277, 1279 (1st Cir. 1973) (mailing was from defendant to students, victims were various universities and colleges).

Dowling's use of the mail to attract customers was an integral feature of the business' success. We find that the mailing of the

catalogs was clearly in furtherance of his scheme to defraud the copyright owners of their royalty fees.

B. Scope of the National Stolen Property Act.

Dowling does not challenge the district court's factual findings that he transported bootleg phonorecords interstate. Rather he argues that he cannot be convicted of interstate transportation of stolen goods under 18 U.S.C. §2314 when what he transported was not a "good, ware or merchandise" within the meaning of the statute. Since this is a question of law, we review de novo the district court's determination that such a conviction was proper. *Moreno-Pulido*, 605 F.2d at 1143.

Dowling's interpretation of 18 U.S.C. §2314 is precluded by this Circuit's decision in *United States v. Belmont*, 715 F.2d 459 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1275 (1984). In *Belmont*, the court held that the unauthorized sale of videotape cassettes of copyrighted motion pictures involves goods, wares or merchandise within the meaning of the statute. The court specifically rejected the argument that Congress intended only the Copyright Act to cover this conduct. *Id.* at 462. The court observed that:

The rights of copyright owners in their protected property are just as deserving of protection from interstate transportation as are the ownership interests of those who own other types of property. When society creates new kinds of property and thieves devise new ways of appropriating that property to their own use, the law against transporting property expands with the growth in the varieties of property.

Id. at 461-62 (footnote omitted).

Belmont is dispositive with regard to the facts before us. Dowling's unauthorized sale of phonorecords of copyrighted material clearly involved "goods, wares or merchandise" within the meaning of the statute.

Dowling's argument that *Belmont* was effectively overruled by the Supreme Court in *Sony Corp. v. Universal City Studios*, ___ U.S. ___, 104 S.Ct. 774 (1984), is without merit. The

Sony opinion is inapposite to the question before us. *Sony* only dealt with the narrow question of whether noncommercial home videotaping constitutes "fair use". *Id.* at 795. *Sony* was silent on the question whether copyrights are property within the meaning of the National Stolen Property Act.

C. Hearsay

Dowling challenges the admission of the testimony of Joan Deary, an RCA employee who testified for the government. He contends that Deary's testimony was hearsay and not within the co-conspirator exception to the hearsay rule. Rule 801(d)(2)(E), Federal Rules of Evidence.¹⁰

Deary testified that in 1979 co-defendant Theaker telephoned her and stated that he had heard that as RCA's Presley archivist she wanted to obtain copies of video cassettes of NBC show out takes. Theaker told her he could acquire copies for her if she would provide him with 50 "samplers"¹¹ in return. When Deary asked Theaker how he obtained the tapes, Theaker said: "I paid somebody \$20,000 at NBC."

To fall within the co-conspirator exception to the hearsay rule, the proffered statement must be one that assists the conspirators in achieving their objectives. *United States v. Layton*, 720 F.2d 548, 556 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1423 (1984). We find that Theaker's statement was made to advance the objectives of the conspiracy and that the district court properly admitted the testimony under the co-conspirator exception to the hearsay rule. Theaker's statement was intended to induce Deary to give him the samplers and furthered the conspiracy's objectives of obtaining new material.

¹⁰Rule 801(d)(2)(E) provides that:

A statement is not hearsay if the statement is offered against a party and is a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

¹¹A "sampler" is a promotional record to be used by a radio station or retail store for promotional purposes.

IV.
CONCLUSION

We find that Dowling's mailing of the catalogs and the resultant breach of his statutory duty to report under 17 U.S.C. § 115 makes his acts punishable under the mail fraud statute 18 U.S.C. § 1341. We also find that Dowling's interstate transportation of bootleg phonorecords is punishable under the National Stolen Property Act, 18 U.S.C. § 2314. There was no evidentiary error in admitting Deary's testimony under Rule 801(d)(2)(E), Federal Rules of Evidence.

Dowling's felony convictions are AFFIRMED.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on October 9, 1984, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and 40 copies)

Solicitor General
Department of Justice
Washington, D.C. 20530
(3 copies)

Assistant U.S. Attorney
Charles Lee
U.S. Courthouse, 14th Floor
312 North Spring Street
Los Angeles, California 90012
(3 copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 9, 1984, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)